No. 15099.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS, GUIDED MISSILE LODGE 1254,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

Brief for International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW), Affiliated With AFL-CIO, as Amicus Curiae.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

STATUTES

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The Interest of Amicus Curiae.

The International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW), views with concern the Decision and Order of the NLRB in this matter. UAW's interest is twofold.

First, your *amicus* is a union which is the collective bargaining representative for 1,500,000 employees in the automobile, aircraft and agricultural implement industries. The Board's decision will affect many, if not all, of its approximately 2,000 collective bargaining agreements which contain union security clauses for the protection of its members.

Second, the scope of the Board's Decision and Order and the blanket proscription of certain applications of union security clauses, as requested by the Board's General Counsel in his brief to this Court will cast a cloud of illegality upon many union security agreements and practices now in effect between the UAW and employers throughout the country.

ARGUMENT.

I.

Introduction.

As *amicus curiae,* we are not primarily arguing the question of the propriety of the Board's Order as it concerns the discharge of Charles E. Pense. Unfortunately, not content with a determination of this issue, the General Counsel, in his brief, has made a broad attack on union security clauses and requested an Order and Decree for enforcement by this Court which would nullify rights and obligations of other employees under all union security clauses in factual situations entirely different from that of Pense. It will be recalled that Pense was neither a laid off employee, nor an employee on leave-of-absence, nor a transferred employee. Yet a broad decree relating to the operation of union security clauses in all these situations is requested by the General Counsel, although clearly the record contains no evidence concerning the employer-employee relationship or the status of employees who returned from layoff or from a leave-of-absence, or who return to the bargaining unit following a transfer.

The Board, in this case, had occasion to review the validity of a so-called maintenance of membership clause. The purpose of such a clause is to place an obligation

on employees who are members on the effective date of the agreement or who voluntarily joined the union thereafter, to maintain union membership for the duration of the contract. The clause involved in this case, in addition, obliged employees who were separated from the bargaining unit and were at the time of such separation subject to the provisions of the clause, to commence dues payment to the union immediately upon their *"rehire."* As to the wording of this clause, the Board found that an employee, on his return to the unit, might be required to rejoin the union immediately even though he had in the meantime resigned his membership. The Board held this to do violence to the statutory requirement that employees must be given at least thirty days following *employment* to join the union. Even if this holding is correct it should clearly be limited to employees who have severed their employer-employee relationship. The Board, however, in ruling on the meaning and scope of the union security clause did so on a scanty record which was only concerned with the discharge of Charles Pense. Inasmuch as the latter had not, so far as this record reveals, been separated from the bargaining unit at any time, there was no evidence which in any way related to the complexities created by various forms of separation from the bargaining unit without the severance of the employment relationship. The discharged employee, or the one who has quit, and then is rehired, is in one situation. As to him, the ruling may have merit. Upon "reemployment" such an employee is "rehired" in accordance with the literal and common sense meaning of the words. But the employee on layoff, or on a leave-of-absence, who maintains his connection with the bargaining unit and preserves seniority and other rights under the collective bargaining

contract, and then returns, clearly presents a totally different case. Yet the Board's carelessly written decision beclouds this otherwise obvious distinction. That this is so is betrayed by the fact that the Board's General Counsel in his brief to this Court fails to draw this line.[1]

In consequence, we respectfully urge this Court in its decision to clarify the area of confusion created by the wholly unrealistic and artificial construction of union security clauses resulting from the Decision and Order below. We believe that the decree requested from this Court by NLRB will have a most adverse effect on employer-union relations and would deny unions the right to enforce union security agreements with respect to persons who retain their employee status intact on layoff, a leave-of-absence, or while working for the employer outside the bargaining unit—but who retain the right to return to the bargaining unit and other rights under the collective bargaining agreement.

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[1]The Board in its Decision spoke as follows concerning this question:

> "The union-security provisions of the contract relied upon here, which is of the maintenance-of-membership variety, are fully set forth in the Intermediate Report. In brief, they require an employee who is separated from the bargaining unit covered by the contract, at a time when he is a member of the Respondent Union, to resume paying membership dues immediately upon his reemployment within the bargaining unit. Thus, an employee who quits his employment or is transferred from the bargaining unit while a member of the Respondent Union must, as a condition of reemployment in any capacity within the unit, resume paying union dues even though he has resigned his union membership in the meantime, a period during which he could not, as an employee outside the bargaining unit covered by the contract, legally have been required by the contract to maintain his union membership. We share the Trial Examiner's opinion that for purposes of this case such an employee, upon the occasion of his reemployment, stands in the same shoes as one being hired by the Respondent Company for the first time, who has never been a member of

An additional difficulty with the Board's position is that its interpretation will affect not only maintenance of membership clauses but will carry over into cases where there is a full union shop. If the employee who is laid off and then recalled is to be treated as a new hire he too would have to be given the statutory rights of a *new* employee, *i.e.,* thirty days or more before he could be compelled to rejoin the union and pay dues. Clearly, such an unreasonable and unrealistic construction should not be foisted upon union shop clauses.

This Court should resolve the doubt which now arises and plainly indicate that the employee who returns to the bargaining unit after a layoff, leave-of-absence, or other separation during which he maintained seniority and other contract rights and is connected otherwise with the bargaining unit, is not entitled to the thirty day grace period accorded to *new* employees by the statute.

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the Respondent Union, and that the existence of a contractual obligation upon an employee in that position to pay union dues beginning with the commencement of his employment would be plainly violative of the Act. While the evidence does not indicate whether the Respondents enforced the provisions in question in an unlawful manner, the Respondent Union concedes in its brief that 'In all situations except a quit, when, as and if a person returned to the unit, he was obligated to resume the payment of dues . . .'"

This language is stretched by the General Counsel on page 12 of his brief as follows:

"The Union's further argument that it could validly require all employees except those permanently severing their employment relationship with the Company to resume payment of dues immediately upon resuming active status in the unit, assumes that such employees, for example, one who had transferred to another plant, somehow became disabled from terminating their membership in the Union through normal union procedures. There is no basis for this assumption. These employees, no less than employees permanently severing their connection with the Company, were entitled, once they were no longer in the unit covered by the contract, to resign or be dropped from the Union."

II.

The Board's Unrealistic Interpretation of Union Security Clauses in This Case Does Violence to the Statutory Language and Congressional Intent.

In amending the union security proviso contained in Section 8(3) of the Wagner Act, Congress was primarily concerned with the alleged evils claimed to be inherent in the so-called "closed shop," which required job applicants to be members of the union *before* being hired or required new employees to join the union immediately in order to secure work. As an alleged remedial measure one of the Taft-Hartley amendments was added to the union security proviso (of Sec. 8(a)(3)). This amendment permits the requirement of union membership "on or after the thirtieth day following the beginning of . . . employment." It is certainly stretching a point to claim that the seniority employee who is laid off, or takes a leave-of-absence, on his return "begins" employment in the same way as does the *new hire*. It is the latter whom the statute was intended to protect.[2] Yet it is precisely this distinction which the Board is beclouding in this case.

Thus the interpretation of the union security clause in the instant case by NLRB is contrary to the legislative history of the Taft-Hartley Act. The Board has construed the union security clause in such a way as to

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[2]See *Legislative History of the Labor-Management Relations Act,* 1947, Volume 1, p. 426:

> "Section 8(a)(3): The proviso to this section has been redrafted to abolish what is narrowly termed the 'closed shop'. An employer is permitted to make agreements requiring membership in a union as a condition of employment applicable to employees in a given bargaining unit 30 days after an employee is hired . . ."

nullify and confuse the administration of all union security clauses. Such a construction is clearly neither required nor permissible, being unjustifiably harsh and technical and at variance with orderly and well-established and understood practices. Apparently in the instant case the Board has misconceived the Congressional intent and conceived its statutory duty to be one of preventing unions and employers from effectuating any union security arrangement and in accomplishing this purpose as stated in its brief, at page 11, the Board is intent to resolve all doubts against the union.

However, even the Taft-Hartley proponents, including Senator Taft himself, wished to aid the unions in their struggles against "free-riders." As Senator Taft stated on April 23, 1947, 93 Cong. Rec. 3953: "In other words, what we do in effect is to say that no one can get a free ride in such a shop." See Sen. Rep. No. 105 on S. 1124, 80th Cong., 1st Sess., 1 Legislative History of the Labor Management Relations Act, 1947, 413 (1948), and remarks of Senator Taft, 2 Legislative History 1010, also 1124, 93 Cong. Rec. 3837, also 4193. It is clear that if a union is to survive, it must meet in some manner the threat of the "free-rider," the employee who wants to take all the benefits of union activity and share none of the burdens. A natural course is a union security provision in the collective bargaining agreement. We respectfully submit that if a mild provision, of the kind here involved, will meet the parties' needs, it should be encouraged and not discouraged by the NLRB.

Nowhere in the legislative history of the 1947 amendments is there any evidence of a Congressional intent to prevent a union from requiring the membership of the employees who were members of the union on the effective

date of the union security agreement or joined the union subsequently and still retain their employee status.

As the Board stated in the case of *Charles A. Krause Milling Company,* 97 NLRB 536:

> "This is emphasized by the constant and exclusive reference to the hiring process and to *new* employees."

See statements by Congressman Mead, 93 Daily Cong. Rec. A2011; Congressmen Smith (Ohio), 93 Cong. Rec. 3620; and Magnuson, 93 Cong. Rec. A2668; and by Senator Ball, 93 Cong. Rec. A2252.

The "maintenance of membership clause" is just what the phrase says. *Employee* members when the contract is signed who leave the unit but retain *employee* status and later return, are required to maintain that membership, for the obvious purpose of any union is to maintain its members within the collective bargaining unit.

Of course, the maintenance of membership provision is the mildest form of union security. To construe this clause against the employer and the union by holding that it does not require maintenance of membership by an employee who has not severed his employment relationship is to ignore the realities. At page 13 of its brief, the Board states that an individual who returns from a leave-of-absence or a transfer or a layoff "stands in the same shoes as one being hired by the respondent company for the first time." This is so patently false that it needs no reply here.

III.

The Board's Decision in This Case Is Inconsistent With Its Own Earlier Rulings on the Status of Laid Off Employees.

We cannot conceive that it was the intention of the Board to phrase an order which requires that employees returning to work following a layoff be treated the same as employees whose employment is severed and who return to work as new employees. Yet this seems to be the strained construction which the General Counsel is placing on the Board's Decision.

Earlier decisions of the Board had clearly preserved the distinction for which we urge here. We agree that an employee who quits his job or is discharged and later rehired, if he withdrew from the Union, has the rights of a new employee. Where an ordinary maintenance of membership clause is in effect, such persons have the status of new employees. See *Idarado Mining Co.,* 77 NLRB 392; and *General American Air Coach,* 90 NLRB 279. In the *Idarado* case, the Board stated the issue as follows:

> "The lawfulness of the Respondent's discharge of Miller depends on whether, under the terms of the maintenance-of-membership clause, Miller was obligated to become a member in good standing of the mine production workers after his *reemployment* by the Respondent." (Italics added.)

But as the Trial Examiner stated in that case at page 400:

> "The record is clear and the undersigned finds, that when Miller returned to the Respondent's em-

> ploy in November 1945, he was rehired as a new employee. . . . Upon his separation in November 1944 he forfeited all his seniority rights and other privileges. He did not regain, as far as the record reveals, those rights and privileges when he was rehired."

If, as it appears, the Board has ruled that a laid-off employee must be treated as a new hire upon his return to work, the Board in the instant case has set up a new and different rule from its procedures under Section 9 of the Act in election proceedings conducted under the auspices of the NLRB. It has been a well-settled rule that employees who are temporarily laid off remain eligible to vote in NLRB representation elections. *Servel,* 65 NLRB 1067; *Swift & Company,* 27 NLRB 903. In these and many other cases, the Board has also considered the eligibility of employees under group insurance plans and other benefits. *International Shoe Company,* 14 NLRB 1140; *Buckeye Oil Company,* 102 NLRB 112. The Board has also ruled that employees who have been granted leaves-of-absence are considered eligible to vote. *American Cyanamid and Chemical Corp.* (1939), 11 NLRB 803; *Armour & Co.* (1949), 83 NLRB 333. Employees who stop working because of poor health are treated as on sick leave and are eligible to vote. *Wright Manufacturing Company,* 106 NLRB 210.

The United States Supreme Court and several of the Federal Circuit Courts have held that the employee status of an employee laid off due to a suspension of work continues because the relation of employer and em-

ployee does not terminate. See *Fishgold v. Sullivan Dry Dock and Repair Company,* 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230, 167 A. L. R. 110 (1946). To the same effect, see the opinion in the *Fishgold* case in the Second Circuit Court of Appeals written by Judge Learned Hand, reported at 154 F. 2d 785 (1946).

In the case of *North Whittier Heights Citrus Association v. N. L. R. B.,* 109 F. 2d 76 (9th Cir., 1940), the Citrus Association laid off certain employees and contended that the layoff was, in fact, a discharge so that the NLRB could not order reinstatement with back pay, since such a right of reinstatement was restricted to someone who maintained an employee relationship. This Circuit held that the layoff because of such temporary shut-down did not sever the relationship of employer and employee. The Court stated in that case:

> "The relation of employer and employee does not always depend upon continuity of actual every day work."

We respectfully submit the same ruling applies to the instant case.

In the case of *N. L. R. B. v. Waterman Steamship Corporation,* 309 U. S. 206, 60 S. Ct. 493, Mr. Justice Black stated:

> "No obstacle of legal principle barred the board from finding that there was, even after the ships were temporarily laid up, a relationship of employment or tenure between the Waterman Company and its men."

The Court further noted that "A large part of all industrial employment is of this nature."

In the case of *Bakery & Confectionery W. I. U. v. National Biscuit Co.,* 177 F. 2d 684 (3 Cir., 1949), the court stated:

> "The Supreme Court of the United States, quoting the Oxford English Dictionary had recognized the sharp distinction between a temporary suspension of an employee's work known in common and industrial parlance as a 'layoff' and 'termination' of the employment relationship or loss of a position."

See also:

> *Lord Manufacturing Co. v. Nemenz,* 55 Fed. Supp. 711, 723.

The Board's prior, much more realistic approach is demonstrated in *Bethlehem Steel Co.,* 86 NLRB 577. There the Board in determining which employees were eligible to vote in a Labor Board election, ruled as follows:

> "The number of employees employed at the San Pedro yard varies considerably. It is the policy of the Employer to retain on its pay roll for a 30-day period all temporarily laid-off employees. Moreover, under the provisions of the Intervenor's contract with the Employer, laid-off employees, who had been employed for more than 30 days, may be recalled and do not lose seniority rights if rehired within 12 months of their layoff. In view of these facts, we find that the laid-off employees retained on the pay roll and the employees laid off for not more than 12 months, who may be recalled under the terms

of the Intervenor's contract, have a reasonable expectation of reemployment by the Employer and are entitled to vote unless they have obtained permanent employment elsewhere."

We respectfully urge this Court, to require the Board to follow this same sensible approach when adjudicating concerning union security provisions.

IV.

The Board's Broad Ruling Concerning Union Security Clauses Was Based on an Inadequate Record and Therefore Does Not Take Into Account the Many Practical Problems Created by It.

An additional difficulty with the Board's decision and the argument as presented it its brief is the fact that the inferences and conclusions therein are drawn from a totally inadequate record devoid of setting forth the practical problems and facts of industrial life. In referring to the legality of union security arrangements, the Board's General Counsel states at page 11 of his brief:

"Any doubt must be resolved against the Union."

If this is so, we submit that the Board should give unions an opportunity to present a complete and full record concerning the intention of the parties in executing various forms of union security clauses and their practices in administering them. Under well-recognized concepts of civil law "a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Civil Code of California, Section 1647. In other cases the Board itself has given

weight to the practices of the parties in interpreting an ambiguous union security clause. *Seattle Bakers Bureau, Inc.,* 101 NLRB 196.

Yet, in the instant case, practically no testimony was presented and the Board's Counsel "persuaded" the union business agent, who was the only representative of the union at the hearing before the trial examiner, to make a record consisting almost entirely of stipulations. It is apparent that at the time of the hearing the respondent union had no idea that the Board would seek so broad an Order and Decree as it does now. Otherwise the stipulations would never have been accepted and further evidence would have been presented.

The International Association of Machinists, in its Exceptions to the Board, requested permission to reopen the record and to argue orally due to the fact that the record was incomplete. The Board saw fit to deny this request. Instead, it read into the evidence interpretations of the union security clause which were neither intended by the parties nor supported by the record. Under such conditions we are compelled to present to this Court the essential realities of industrial life which ought to be taken into account in rulings relating to union security. For the "meat and muscle" of labor relations are not words alone and it is the particular vice of the Board's position in this case that it is taken without reference to or apparent knowledge of the factual situation necessitating the union security clause in question.

As a result of the fluctuating nature of government contracts, there are frequently in the aircraft industry large numbers of laid off employees, running into the thousands. Such employees, as a rule, retain seniority and recall rights for a period of two years. In a similiar fashion, employees may be transferred out of the bargaining unit and for periods of time are not working within the bargaining unit. Referring to another common situation, the automobile industry has long been characterized by the so-called annual model-change layoff. This, in the case of a major manufacturer, may result in the suspension of work for a brief period of time for hundreds of thousands of employees.

To treat individuals returning to work under any of the aforedescribed circumstances as new employees (for purposes of union security or indeed for any other purpose) is so unrealistic as to be almost fantastic. It would leave the parties time for little else than to see to the problem of proper administration of the union security provisions in their agreements to the obvious detriment of more important ends.

Summary and Conclusion.

The confusion created by the Board in this case may have been caused in part by the use of the words "upon rehire within the bargaining unit" in the union security provisions involved. The use of these words may well have been an unfortunate one. But we agree with IAM when it argues that Pense's discharge was in any event

lawful because it was in accordance with the unquestionably valid union security requirements of the agreement and was not for a reason other than the failure to tender monthly union dues or initiation fees uniformly required to maintain union membership.

Beyond this, as we have already argued, the Board and its General Counsel in this case have gone unnecessarily far and created unnecessary confusion by arguing that an employee returning from a layoff or leave-of-absence or transfer is in the position of one being "rehired" within the bargaining unit. Such an employee is not rehired. There is no break in the employment status. A mere change in that status is not a rehire. The benefits, rights and duties of the employment relationship are not changed. Only in the case of a quit or a discharge is there a definite and final severance of all benefits, rights and privileges under the collective bargaining contract.[3]

We respectfully urge this Court to make plain this elementary and common sense distinction and hold that the statutory prohibitions against requiring immediate union membership apply only to *new* employees and employees

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[3]The seniority clauses in the collective bargaining contracts [General Counsel's Exhibits Nos. 6 and 9] provide and guarantee certain rights to employees on layoff or leave-of-absence. In either case the employer-employee relationship continues and the employee derives rights from the collective agreement. The same holds true for an employee who is transferred out of the unit or becomes a supervisor. Thus, although an employee may not for a time be working within the bargaining unit, he maintains his connection with and rights in it.

rehired following a quit or final discharge and do not apply to employees returning to work in the bargaining unit following a layoff, leave-of-absence or transfer.

Respectfully submitted,

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Dated: October 11, 1956.